THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Second Appeal No. 916 of 2001
Old Second Appeal No. 946 of 1997

1. The State of U.P. through District Magistrate, Haridwar.
2. The Executive Engineer, Nalkoop Department,
   Roorkee, District Haridwar. (Defendants)

… Appellants.

Versus

Jameel Ahmad, Son of Siddique,
Resident of village Safarpur, Pargana and Tahsil Bhagwanpur,
Roorkee, District Haridwar. (Plaintiff)

… Respondent.

Mrs. Mamta Bisht learned Brief Holder for the State-appellants.
None appeared for the respondent despite service.

Dated April 20, 2006.

Hon. B.S. Verma , J.

Heard Mrs. Mamta Bisht, learned counsel appearing on behalf of the Appellants-State and Sri A. Pathak learned counsel for the respondent.

This Second Appeal has been preferred against the judgment and decree dated 14-8-1997 passed by the then Civil Judge (Senior Division) Roorkee in Civil Appeal No. 13 of 1996, Sri Jamil Ahmad Vs. State of U.P. and another, whereby the learned Civil Judge (Senior Division) Roorkee allowed the appeal and reversed the judgment and decree dated 11.7.1996 of the trial court and the suit of the plaintiff for permanent injunction against the defendant-appellants was decreed. The defendants were restrained from interfering with the disputed property namely the trees standing on Khasara no. 292 belonging of the plaintiff as mentioned in the order.

Relevant facts giving rise to the present second appeal are that the plaintiff-respondent filed Original Suit No. 70 of 1995 against the defendants in the Court of Civil Judge (Junior Division) Roorkee for permanent injunction restraining the defendants not to

interfere with the property of the plaintiffs over the disputed land and trees standing thereon, with the averment that the plaintiff is Bhumidhar in possession with transferable rights over Khasara No. 292 of village Safarpur, Pargana and Tahsil Roorkee. The plaintiff had grown *Sheesham, Peepal, Tutari* and other trees over his land. Towards the western side of this land, there existed a Gool of the defendant- department in Khasara No. 305 and towards west of this Gool, there is P.W.D. road over Khasara no. 278. Prior to year 1977, the P.W.D. while constructing the road, merged the area covered by Gool in the road which resulted in the closure of Tube-well no. 95 R.G. which existed towards west of the disputed property. In November 1977 at the request of the then Junior Engineer, the plaintiff as well as one Mohd. Yamin offered/gifted the land of Khasara no. 295 for construction of ***Gool*** but the plaintiff retained his rights and possession over the trees standing over the said plot no. 295 and since then, the plaintiff has been enjoying his right, title and possession over the trees and he is the owner thereof. It was further pleaded that the Department had admitted that it will have no rights on the trees grown on the boundary of the Gool. On this condition, the Gool was constructed by the defendant no.2 On a threat given to the plaintiff on 26-4-1994 by the officials of Tube-well Department not to allow the plaintiff to cut the said threes, thereby challenging his right over the trees, the plaintiff on 27-4-1994 served a notice under Section 80 CPC upon the defendants. The defendant no. 2 got an enquiry made by Tahsildar Roorkee, who clarified in the report that the trees standing over Khasara no. 292 belonged to the plaintiff. According to the plaintiff, the trees having been fully grown up, he intended to cut them. When the defendants did not agree to the right of the plaintiff, the suit was filed for permanent injunction.

The defendants filed their written statement and denied the plaint allegations. It was asserted that the defendants are owners of the trees in question and plaintiff had no concern over the trees and land. It was stated that the trees were planted by the defendant-

department. The defendants raised a plea that the suit of the plaintiff is barred by Sections 34, 38 and 41 of the Specific Relief Act.

On the pleadings of the parties, the trial court framed as many as six issues in the suit. After recording the evidence, the trial court did not find favour with contention of the plaintiff and decided Issue Nos. 1, 2, 4 and 5 holding that the disputed trees are not standing over Khasara no. 292; that the plaintiff is not the owner of the disputed trees and the suit of the plaintiff is barred by the provisions of Section 80 C.P.C. and under Section 34 of the Specific Relief Act. The trial court decided Issue No. 3 against the plaintiff and in favour of the defendant that the defendants are owner of the trees in question. On the basis of these findings, the suit of the plaintiff was dismissed with costs vide judgment and decree dated 11-7-1996. Aggrieved, the plaintiff-respondent went up in appeal before the Civil Judge (Senior Division) Roorkee.

The learned appellate court framed three issues for the decision of appeal. The Issue No. 1 was to the effect whether the disputed trees are standing over Khasara no. 292 and whether they are the property of the plaintiff or the defendants. Issue No.2 related to bar of suit under Section 80 C.P.C. and Issue No. 3 was regarding bar of the suit under the provisions of Specific Relief Act. It finds place to mention here that the appellate court vide order dated 8-4-1997 directed the defendant-respondents to produce the originals of paper nos. 18-C, 19-C, 22-C, 23-C, 24-C and 26-C, the copies whereof were filed by the plaintiff and the originals were in possession of the defendant-respondents, failing which it was ordered that they shall be read in evidence under Section 114 of the Evidence Act against the defendants, but the order of the appellate court was never complied with and even the defendant-respondents could not dare file any affidavit to the effect that the originals of these papers were not in their possession. The learned Civil Judge (Senior Division) after re-appreciating the evidence on record, came to the conclusion that the finding record by the trial court was not

maintainable and it was held that the plaintiff is the owner of the disputed trees. The appellate court further came to the conclusion that the suit of the plaintiff is not barred by the provisions of Section 80 C.P.C. The Civil Judge (Senior Division) on the basis of his finding that the disputed trees are standing over Khasara No. 292 of which the plaintiff is the owner in possession and that the suit is for permanent injunction and not for declaration held that the suit is not barred by Section 34 of the Specific Relief Act. Ultimately, the suit of the plaintiff was decreed against the defendants and the judgment and decree of the trial court was set aside.

The Second Appeal was admitted on 20-5-2005 on the substantial question of law of the ground nos. 1 and 2 taken in the memo of appeal thereby the following questions of law have arisen to be answered:-

1. Whether the appellate Court below has acted illegally in deciding the controversy of injunction matter by granting the relief of declaration, which could not have been granted merely by way of injunction?

2. Whether the appellate court below has acted illegally in deciding the controversy in the present matter in dispute, which involves the question of ownership as well as title and which could only be decided by the Revenue Court and not the Civil Court by way of injunction?

Answer to question of law no. 1 and 2:-

Initially the suit of the plaintiff-respondent was dismissed by the trial court on the ground that the defendants are the owner of the trees in question. Aggrieved by the judgment and decree dated 11.7.1996, the plaintiff-respondent went in appeal before the Civil Judge (Senior Division) Roorkee and the Appellate Court reversed the findings of the trial court and held that the disputed trees are standing on Khasara No. 292 of which the plaintiff

is the owner in possession of the land and it was also held that the suit was not barred by Section 34 of the Specific Relief Act.

Both the aforesaid question relate to the ownership of the land in dispute and the trees standing on the said land. To answer both the questions, the Issue No.1 framed by the Appellate Court is relevant which is to the effect whether the dispute trees are standing in the land of Khasara Nos. 292 and whether the trees and the property of the plaintiff. According to the plaintiff, he is Bhumidhar with transferable right of the land of Khasara nos. 292 and towards west there was a Gool of Tube-well Department existing in Khasara No. 305 and towards west of the ***Gool,*** there existed P.W.D. road on Khasara No. 278. Prior to the year 1977, the Public Works Department while construction the road merged the Gool in the road, thereby the Gool of the Tube-well department existing in Khasara no. 305 lost its existence on the spot. Then on the request made by Sri D.P.Singh, Junior Engineer of the said Tube-well Department, the plaintiff gave permission to construct the Gool in his land of Khasara No. 295. The land belongs to the plaintiff, who only gave permission for continuing the Gool in Khasara No. 292. It does not mean that the trees standing on the land of Khasara No. 292 belonged to the Tube Well Department of Irrigation.

The argument of the learned Standing Counsel on the question of law is that the Civil Court is not competent to declare the plaintiff owner of the trees and land. The plaintiff proved his case by filing revenue documents showing that he is Bhumidhar of Khasara No. 292. The learned appellate court has relied upon the statement of defendants' witness Vinod Kumar Arora, Assistant Engineer of the Tube Well Department, who was examined as D.W.1 and deposed that the land of Khasara no. 278 was acquired for construction of the Gool and according to the appellant, they have no concern with Khasara Nos. 292. The plaintiff had filed the Khasara of 1403 Fasali (paper no. 64-C/2) and Khautani of 1401-1406 Fasali (paper no. 61-C), in which the area of Khasara nos. 292 is recorded

2.379 Hectares and from a perusal of both the documents, it is proved that the owner and Bhumidhar of the land is plaintiff Jamil Ahmad and the entry of Khasara, which is a document of possession shows that the trees are standing in a portion of plot no. 292. The plaintiff-respondent has examined Sri D.P.Singh, the then Junior Engineer, as P.W.2. He has specifically stated on oath that the trees in dispute were standing thereon prior to the year 1977. He was posted in 1977 in the Tube Well department and he stated on oath that paper no. 31-C filed by the plaintiff. This paper shows that on the request of Sri D.P.Singh, the Junior Engineer, the farmers of the village including the plaintiff had given their land for construction of the ***Gool***, which came to an end due to construction of P.W.D. road. This witness has proved that the endorsement made by him on this document is correct. It is evident from paper no. 31-C1 that the then Junior Engineer D.P.Singh had admitted ownership of plaintiff-respondent over the trees, which are standing on the boundary of ***Gool,*** there will be no right of the department in future, because the trees are standing earlier to the construction of the ***Gool*** and it also reveals from this paper that the plaintiff and one Mohd. Yamin had given the area of Khasara nos. 292 and 295 for construction of the ***Gool*** as gift/donation and the plaintiff and Mohd. Yamin has also written in this document that the trees standing over these plots were not given to the Government and they have right to cut the trees and the Department will not compel the plaintiff and Mohd. Yamin for cutting the trees unless the trees are fully grown up.

The appellate court in the appeal passed an order dated 8-4-1997 and directed the appellant-defendants to produce the originals of paper nos. 18-C, 19-C, 22-C, 23-C, 24-C and 26-C, which were filed by the plaintiff-appellant but the original thereof was in possession of the defendants and it was further ordered that if the originals were not produced before the Court, an adverse inference will be drawn under Section 114 of the Evidence Act in respect of these document. Despite order of the appellate court, the defendants-appellants did not produce the original copies of these

papers and the learned Appellate Court rightly admitted these papers in evidence and drew adverse presumption against the defendant-appellants. The learned appellate court has rightly set aside the finding of the trial court and decreed the suit of the plaintiff for permanent injunction restraining the defendants not to interfere with the trees belonging to the plaintiff, he being a recorded tenure holder.

Both the questions are answered against the defendant-appellants accordingly. The appeal is liable to be dismissed.

The appeal is dismissed. The judgment and decree, under appeal, is upheld. In the circumstances of the case, no order as to costs.

(B.S.Verma,J)

RCP